

**COURT OF CRIMINAL APPEALS
OF TEXAS**

Number 0732-82

**LUNA, CHARLES E. IN THE 5TH COURT
VS. OF APPEALS
THE STATE OF TEXAS COURT OF APPEALS
NO. 05-81-0117**

ORDER

The Appellant's petition for discretionary review in the aboved numbered and entitled cause is refused.

PER CURIAM

Delivered October 13, 1982

Motion for Rehearing denied on November 24, 1982.

A TRUE COPY ATTEST:

**THOMAS LOWE, CLERK
COURT OF CRIMINAL APPEALS**

**By: /s/ Sherrie Ericson
Sherrie Ericson
Deputy Clerk**

Do not issue your mandate for fifteen (15) days from November 24, 1982.

COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

NO. 05-81-01177-CR

CHARLES E. LUNA,
APPELLANT

FROM A DISTRICT
COURT

VS.

THE STATE OF TEXAS,
APPELLEE

OF DALLAS COUNTY,
TEXAS

BEFORE JUSTICES ROBERTSON, STEPHENS
AND VANCE
OPINION PER CURIAM
NOVEMBER 12, 1981

Appellant entered a plea of guilty before a jury to the offense of commercial bribery. See TEX. PENAL CODE ANN. § 32.43(b)(1) (Vernon 1974). He was convicted and the jury assessed punishment at confinement for five years.

The record is before us without a statement of facts. No brief has been filed on behalf of the appellant pursuant to TEX. CODE CRIM. PRO. ANN. art.

A3

40.09, § 9 (Vernon Supp. 1980-81).

There is no showing of indigency and we find no fundamental error.

The judgment is affirmed.

PER CURIAM

D.N.P.

No. 0732-82

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS
Austin, Texas

Charles E. Luna,
Appellant

V.

The State of Texas,
Appellee

PETITION FOR DISCRETIONARY REVIEW

From the Fifth Supreme Judicial Court
of Appeals
Dallas County, Texas
Cause No. 05-81-01177CR

Fred Head
Attorney at Law
Box F.H.
Athens, Texas 75751
Phone 214/675-5111
Bar I.D. No. 0931900
Attorney for Appellant
Charles E. Luna

SUBJECT INDEX

	<u>Page</u>
GENERAL STATEMENT OF THE NATURE OF THE CASE	A7
STATEMENT OF THE PROCEDURAL HISTORY OF THE CASE	A8
GROUND'S FOR REVIEW	A10
REASONS FOR REVIEW	A13
CONCLUSION AND PRAYER	A17
CERTIFICATE OF SERVICE	A19

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

Austin Texas

Charles E. Luna,	X	From the
Appellant	X	Fifth Supreme
	X	Judicial Court
V.	X	of Appeals
	X	Cause No.
	X	05-81-001177CR
The State of Texas,	X	Dallas County,
Appellee	X	Texas

PETITION FOR DISCRETIONARY REVIEW

To the Honorable Judges of said Court:

Now comes Charles E. Luna, Appellant, in the above entitled and numbered cause and pursuant to Article 44.45(b)(1) Texas Code of Criminal Procedure files this his Petition for Discretionary Review and would show to the Court as follows:

I.

General Statement of the Nature of
the Case

The Appellant, Charles E. Luna, was indicted by a grand jury in Dallas County, Texas on March 6, 1979, and on July 13, 1979, was found guilty of the offense of Commercial Bribery, alleged to have been committed on or about the 26th day of January, 1979, and assessed punishment of five (5) years confinement in the Texas Department of Corrections by a jury in Dallas County, this being a violation of Article 32.43 Texas Penal Code, a statute under which a case concerning violation thereof has not yet reached the Texas Court of Criminal Appeals, although having been enacted by the Texas Legislature as a part of the new Penal Code in the year

of 1973 and effective January 1, 1974. On August 17, 1979, Appellant was sentenced to serve a term of not less than two nor more than five years in the Texas Department of Corrections. Notice of Appeal was given in open Court on that date. The Fifth Supreme Judicial Court of Appeals at Dallas, Texas, affirmed by Per Curiam Opinion on November 12, 1981.

II.

Statement of the Procedural History
of the Case

<u>Date</u>	<u>Action taken</u>
11-12-81	Court of Appeals affirmed Judgment of Trial Court by Per Curiam Opinion.
11-30-81	Motion for Rehearing filed by Appellant Charles E. Luna.
12-9-81	Motion in Opposition to Appellant's Motion for Rehearing filed by the State.

<u>Date</u>	<u>Action taken</u>
1-27-82	Motion to Continue Rehearing filed by Appellant Charles E. Luna.
1-27-82	Pauper's Oath for Appeal filed by Appellant Charles E. Luna.
1-27-82	Application for Out of Time Appeal and Extension of Time filed by Appellant Charles E. Luna.
1-27-82	Answer to State's Motion in Opposition to Appellant's Motion for Rehearing filed by Appellant Charles E. Luna.
1-27-82	First Amended Motion for Rehearing filed by Appellant Charles E. Luna.
3-1-82	Order of the Fifth Court of Appeals Overruling Appellant Charles E. Luna's Motion to Continue Rehearing.
3-31-82	Order of the Fifth Court of Appeals Overruling Appellant Charles E. Luna's Motion for Rehearing.

III.

Grounds for Review

1) No case decided by the Texas Court of Criminal Appeals under Article 32.43 of the Texas Penal Code, the Commercial Bribery Statute.

2) Trial Court Judge (The Honorable Herbert Line) heard the trial of the case through retirement of the jury for deliberation and then left the bench, allowing the substitution of another Judge (The Honorable Ed Gossett) at a very important juncture in the trial thereby denying the Appellant Charles E. Luna the valuable right of having the Judge who heard all the testimony in the trial to also rule on the question of granting probation to Appellant, this causing injury to Appellant.

3) Trial Court failed to rule on Motion to Reopen the case.

4) Trial Court failed to hold hearing on the question of indigency and rule thereon.

5) Trial Court failed to notify Appellant that the cause was being sent to the Court of Appeals.

6) Fifth Court of Appeals failed to notify Fred Head, Counsel for Appellant, that said Court had this cause under consideration.

7) Fifth Court of Appeals failed to notify Fred Head, Counsel for Appellant, that said Court had set this cause for submission.

8) Fifth Court of Appeals failed to notify Fred Head, Counsel for Appellant, of the date and time this cause was set for submission.

9) Fifth Court of Appeals failed to allow Fred Head, Counsel for Appellant, to orally argue this cause, a matter of right under Article 44.33 of the Texas Code of Criminal Procedure.

10) Fifth Court of Appeals failed to hold a hearing and rule on the question of indigency of the Appellant (or return the case to the Trial Court for it to hold a hearing and rule) after Affidavit of Indigency filed.

11) Fifth Court of Appeals failed to grant Out of Time Appeal of this cause, to grant Extension of Time, and to allow the record to be supplemented so that the record would speak the truth. In fact, the Fifth Court of Appeals has failed to rule at all on Appellant's Motion for Out of Time Appeal and Extension of Time.

12) Fifth Court of Appeals failed to grant Motion for Rehearing, correct other matters complained of above, and resubmit this cause for rehearing with a full and complete record that speaks the truth and upon required oral argument.

IV.

Reasons for Review

A. Rule 302(c)(2) "Where a court of appeals has decided an important question of state or federal law which has not been, but should be, settled by the Court of Criminal Appeals;"

This cause and Appellant's ground or error number 1) above state fall squarely within the language of Rule 302(c)(2) of the Rules of the Court of Criminal Appeals pertaining to Discretionary Review in General. Article

32.43 of the Texas Penal Code, the Commercial Bribery Statute, enacted in 1973 and effective January 1, 1974, and the interpretation of said statute by the courts certainly contain important questions of state law. Counsel for Appellant Charles E. Luna has made a diligent search and has found that the Texas Court of Criminal Appeals has not yet decided a case under the said Article 32.43. Since the Fifth Court of Appeals has now decided this cause under said Article 32.43 in a proceeding containing numerous questions in the trial court as well as the Fifth Court of Appeals, the Court of Criminal Appeals should settle these questions by granting discretionary review, requiring the correction of errors of the trial court and the Fifth Court of

Appeals, and then, if necessary, writing on this case based on a full and complete record and the required oral argument.

B. Rule 302(c)(6) "Where a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision."

Without restating the above grounds of review, Appellant would point out to the Court that his grounds of review numbers 2) through 12) above stated fall primarily under Rule 302(c)(6) of the Rules of the Court of Criminal Appeals pertaining to Discretionary Review in General, but might also be considered by the Court of Criminal Appeals to be

reviewable under Sections (3) and (4) of the said Rule 302(c).

It seems apparent to Counsel for Appellant that the failures by the trial court and the Fifth Court of Appeals to give notice to Counsel for Appellant when notice was required, to hear matters that should have been heard, to allow oral argument when oral argument was required, and to rule on matters requiring a ruling clearly invoke the power of supervision of the Court of Criminal Appeals and clearly state a case requiring discretionary review by said Court. Therefore, Counsel for Appellant has not felt the necessity to cite case authorities under Sections (3) and (4) of Rule 302(c) or otherwise in this petition but will do so in Appellant's Brief.

V.

Prayer for Relief

Wherefore, premises considered, Appellant Charles E. Luna respectfully prays the Texas Court of Criminal Appeals to grant discretionary review in this cause and that upon review the decision of the Fifth Court of Appeals affirming the trial court be reversed and the cause returned to the Fifth Court of Appeals with instructions to said Court to abate the appeal, grant an extension of time for filing a full and complete record of the case including a statement of facts so that the record will speak the truth, and return the cause to the trial court for said trial court to hold a hearing on and determine the question of indigency of the Appellant. Appellant further prays

that said trial court be instructed to grant a free record of the case to Appellant if he is found to be indigent and that the trial court be instructed to rule on Appellant's Motion to Reopen the case. Appellant still further prays this Court to instruct the Fifth Court of Appeals to rehear this cause based on a full and complete record and the required oral argument after proper notice.

Respectfully submitted,

/s/ Fred Head

Fred Head
Attorney at Law
Box F.H.
Athens, Texas 75751
Phone 214/675-5111
Bar I.D. No. 09319000

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Discretionary Review has been served on Mr. Henry G. Whitley, Attorney for the Appellee, The State of Texas, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas, 75202, and State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711, by depositing same in the United States Mail, Postage Prepaid, on this the 3rd day of May, 1982.

/s/ Fred Head

Fred Head

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

Austin, Texas

Charles E. Luna,	X	From the
Appellant	X	Fifth Supreme
	X	Judicial Court
V.	X	of Appeals
	X	Cause No.
	X	05-81-001177CR
The State of Texas,	X	Dallas County,
Appellee	X	Texas

Motion for Rehearing

To the Honorable Judges of Said Court:

Charles E. Luna, Appellant, files this his motion for rehearing and as grounds therefor would show the Court as follows:

Appellant was denied due process because his counsel of record was not timely notified of the submission of his case to the Court of Appeals in Dallas. Because of this lack of notice, Appellant's counsel was unable to obtain a

statement of facts, to prepare and submit a brief, or to argue the case in person before the Court. Had counsel been timely notified, he would have been able to show the Court of Appeals that Appellant was ineffectively represented by trial counsel.

This Court should grant Appellant's Petition for Discretionary Review and examine the record in this case. The record will show that Appellant was a casualty of the confusion surrounding the transfer of criminal jurisdiction to the former courts of civil appeals. Although the confusion was probably inevitable, it should not be allowed to deny Appellant the opportunity to participate effectively in his one appeal of right.

Wherefore, Appellant prays the Court to rehear his Petition for Discretionary Review and grant the relief requested therein.

Respectfully submitted,

/s/ Seth S. Searcy III
Seth S. Searcy III
Attorney at Law
505 W. 14th Street
Austin, Texas 78705
(512) 472-3167
State Bar No. 17955000

/s/ Fred Head
Fred Head
Attorney at Law
Box F.H.
Athens, Texas 75751
(214) 675-5111
State Bar No. 09319000

Attorneys for Appellant
Charles E. Luna

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for Rehearing has been served on Mr. Henry G. Whitley, Attorney for the Appellee, The State of Texas, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas, 75202, and State Prosecuting Attorney, P.O. Box 12405, Austin, Texas, 78711, by depositing same in the United States Mail, Postage Prepaid, on this the 28th day of October, 1982.

/s/ Seth S Searcy III
Seth S. Searcy III

/s/ Fred Head
Fred Head

FRED HEAD
Attorney & Counselor
Box F H
Athens, Texas 75751
Telephone (214) 675-1600

January 29, 1980

The Honorable Judge Thomas B. Thorpe
203rd Judicial District Court
Dallas County Courthouse
Dallas, Texas

Dear Judge Thorpe,

In accordance with our recent telephone conversation, this letter will confirm that I am to be listed and considered as attorney of record for Charles E. Luna in State of Texas vs. Charles E. Luna, No. F79-2400-).

Sincerely yours,

/s/ Fred Head

Fred Head

FH:ch
cc:

Mr. Jon Sparling
Mr. Bill Shaw
Mr. Robert Hinton